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No. 684.

IN THE

SUPREME COURT OF THE UNITED STATES.

ABBOTT ESTRIN, Individually and as President of Abbott Exterminating Company and ABBOTT EXTERMINATING COMPANY, a Corporation,
Appellants,

v.

W. F. MOSS, Commissioner of Agriculture of Tennessee, H. L. BRUER, Director, Division of Plant Industries in the Tennessee Department of Agriculture; and GEORGE F. McCANLESS, Attorney General of Tennessee,
Appellees.

On Appeal from the Supreme Court of the State of Tennessee.

MOTION TO AFFIRM.

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W. F. MOSS, Commissioner of Agriculture of Tennessee, H. L. BRUER, Director, Division of Plant Industries in the Tennessee Department of Agriculture; and GEORGE F. McCANLESS, Attorney General of Tennessee,
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On Appeal from the Supreme Court of the State of Tennessee.

MOTION TO AFFIRM.

Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the Supreme Court of the State of Tennessee be affirmed on the ground that the questions presented are so unsubtantial as not to warrant further argument.

STATEMENT.

This is an appeal from the final judgment and decree entered on June 26, 1968, by the Supreme Court of the State of Tennessee. Said decision is reported at 430 S. W. 2d 345. Appellants sought to set aside the judgment of the Chancery Court for Davidson County that the provisions of Chapter VI of Title 43 of the Tennessee Code Annotated were not violative of the provisions of the Constitutions of the United States or of the State of Tennessee. Appeal to this Court is pursuant to 28 U. S. C., § 1257 (2).

On January 23, 1967, and February 24, 1967, appellants, Abbott Estrin and Abbott Exterminating Co., were mailed documents styled as "Notice of Intention to Revoke License", such style being dictated by the terms of T. C. A., § 43-614 (Appendix, Jurisdictional Statement of Appellant—pp. C-6 and C-7). The statutory basis for the charges, same being set forth in T. C. A., § 43-613 (Appendix, Jurisdictional Statement of Appellant—pp. C-4 and C-5), was set forth in the said notice, together with the specific violations which were to be the basis of any action by the Department of Agriculture. The aforesaid notices charged 1398 separate violations of T. C. A., § 43-614.

On March 8, 1967, the Chancery Court of Davidson County issued a preliminary injuction which restrained appellees from further action with regard to a hearing on the charges, pending a determination of the constitutionality of certain provisions of Chapter VI, Title 43 of the Tennessee Code Annotated. As previously noted, the decision of both the Chancery Court and the Supreme Court of Tennessee upheld the challenged Act. An injunction has remained in effect pending exhaustion of appellant's remedies.

The issues presented to the state court were: whether T. C. A., § 43-613, and the regulations issued pursuant thereto were violative of the Constitution of either the United States or the State of Tennessee as an unlawful classification of the pest control industry and thus an unconstitutional exercise of the police powers by the Legislature of the State of Tennessee; whether T. C. A., §§ 43-609, 43-610 and 43-613, are so vague and ambiguous as to be unconstitutional; and whether the provisions of T. C. A., § 43-614, dealing with revocation of licenses adequately met the requirements of due process. The State court determined there was no constitutional violation. Appeal to this Court is predicated upon unreasonable classification; inequality of application of the tax; and violation of the due process in that the Commissioner of Agriculture is both the charging party and the hearing officer.

ARGUMENT.

1. The Classification Is Not Arbitrary or Unreasonable.

The decision of the State court adequately dealt with the questions now presented to this Court and that decision is plainly correct. The holdings of this Court, as are briefly set forth below, are to the same effect as those state decisions cited by the Tennessee court.

This Court in **Goldblatt v. Town of Hempstead,** 369 U. S. 590, 82 S. Ct. 987, 8 L. Ed. 2d 130, held that a town ordinance prohibiting excavations below two feet above maximum ground water level was a valid exercise of the town's police power. The Court therein set forth the relevant standards which are determinative of whether substantial questions are now presented to the Court. The Court stated:

> "Our past cases leave no doubt that appellants had the burden on 'reasonableness.' E. g., Bibb v. Navajo Freight Lines, Inc., 359 U. S. 520, 529, 79 S. Ct. 962, 3 L. ed. 2d 1003 (exercise of police power is presumed to be constitutionally valid); Salsburg v. Maryland, 346 U. S. 545, 553, 74 S. Ct. 280, 98 L. ed. 281, 289 (the presumption of reasonableness is with the State); United States v. Carolene Products Co., 304 U. S. 144, 154, 58 S. Ct. 778, 82 L. ed. 1234 (exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it)." 369 U. S. at 596.

Further, the Court noted:

> "The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness,' this Court has

> generally refrained from announcing any specific criteria. The classic statement of the rule in Lawton v. Steele, 152 U. S. 133, 137, 14 S. Ct. 499, 38 L. ed. 385, is still valid today: 'To justify the State . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and second, that the means are resonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.' " 369 U. S. at 594-595.

In **East New York Savings Bank v. Hahn**, 326 U. S. 230, 232-233, 66 S. Ct. 69, 90 L. Ed. 34, the Court stated:

> "The State has the 'sovereign right . . . to protect the . . . general welfare of the people. . . .' Once we are in this domain of the reserve power of a State we must respect the 'wide discretion on the part of the legislature in determining what is and what is not necessary.' "

This rule was approved in **El Paso v. Simmons**, 379 U. S. 497, 508-509, 85 S. Ct. 577, 13 L. Ed. 2d 446.

In the instant cause appellants seek to establish that a substantial question is presented with regard to "classification" by two basic points: (1) the Tennessee court failed to consider the reasonableness of the act of the Tennessee legislature in establishing termite control as a separate group and (2) that the poisons and procedures used by operators performing termite control are less dangerous "than the other licensed categories of pest control."

It is absolutely clear that the Tennessee court, following a consideration of the standards applicable, addressed itself to whether a reasonable classification had been established. The Tennessee court at 430 S. W. 2d at 349 set forth the appellants' argument as follows:

"Complainant insists there are no reasons for imposing the extra statutory burdens of Section 43-613 on termite exterminators, and the requirements of Section 43-613 are not substantially related to public health, safety, or welfare."

The Court then stated:

"Exhibit 'C' to the complainant's bill is a copy of the 'Rules and Regulations Governing Pest Control Operators.' These regulations, issued by the Department of Agriculture pursuant to Section 43-615, include a detailed schedule of required methods of termite treatment and extermination. The treatment involves the application of highly toxic poisons to private residential as well as commercial buildings. Section 43-615 specifically authorizes the Department of Agriculture to set certain minimum standards of service and to regulate enforcement of its provisions. The regulations further provide for periodic inspections by the Commissioner or his agents for the purpose of determining whether licensed operators are maintaining the minimum standards. Where the services of an operator are substandard, Section 43-614 provides for suspension or revocation of the license.

"When the Sections under attack and the regulations are read, we think it clear the legislature has required the business of termite extermination be regulated in order to protect the health, safety and welfare of the citizens of this State."

Appellees submit that it is absolutely clear that the Tennessee court found the classification to be reasonable.

Appellants only attempt to carry their burden is by a belated affidavit appended to the "Statement as to Jurisdiction" (Appendix E). It is clear that the statements included therein are offered for the first time to this Court

and are the mere opinions of a self styled expert who also happens to be an interested party. The matters presented therein are not properly before the Court; however, assuming their correctness, the standards established by this Court for the establishment of unreasonableness are not met, i. e. appellants have not carried their burden of proof.

In the cause at issue the appellants are concerned that persons engaged in the field of termite control are more rigidly regulated than certain other named persons. This argument does not, without more, demonstrate that the Legislature has acted arbitrarily and without reasons in the establishment of the termite control classification. The question is whether the complainants have carried their burden of showing that the classification of termite control operators is arbitrary and further, that the Legislature had no conceivable reason for the classification.

This Court may of its own knowledge notice that the field of termite control is more closely related to the individual homeowners than any of the other listed fields, which are primarily commercially oriented. Additionally the Court may notice and the Legislature may have reasonably concluded that termite control involves a modus operandi which renders the individual home-owners helpless to determine the degree of termite protection which he has received and the degree of safety with which the treatment was performed. For example, it is not difficult to determine if pest or rodent control has been effective but contrarily the damage to the homeowner may be accomplished before he can determine if termite control has been effective. Trained personnel are required to determine if a building has in fact been treated for termites and if the treatment will be or has been effective. Finally, it may be asserted that the regulations applicable to termite control operators may suggest that the Legislature

had reason to believe that the public should be offered protection from the activities of those in the termite control business, while the same factors did not exist in other fields.

The regulations of the Department of Agriculture, for example Nos. 6, 7, 8, and 9 set forth the precise steps to be taken in the area of termite control and in areas where protection of the individual home-owner is required. It is obvious that random checking is required to determine if these regulations are being complied with. It is equally clear that such checking of the work of a termite exterminator may more easily be accomplished if there is systematic disclosure. It will be further noted that all funds collected under the provisions of Chapter VI of Title 43 shall be used in carrying out the provisions of the chapter. T. C. A., § 43-618.

Appellants respectfully submit that the classification is not so lacking in rational justification as to constitute a constitutional deprivation. The "concern here is with power not with wisdom." **Helvering v. Davis**, 301 U. S. 619, 644, 57 S. Ct. 904, 81 L. Ed. 1307. It is the assertion of the appellants that the Legislature of the State of Tennessee has the power to regulate and control the activities of termite control operators and to bring them under State supervision in the interest of the public.

It is respectfully submitted that this "state of facts either known or which (can) be reasonably assumed" affords sufficient support for the upholding of the constitutionality of the questioned legislation.

2. There Is No Inequality in the Application of the Tax.

Appellees further submit that there is no inequality in the application of the tax. T. C. A., § 43-613 states that:

"Every licensed pest control operator shall enter into a written contract with the person, firm, or corporation employing him to prevent, control, or eradicate termites and a separate contract must be given for each structure or building except that an industrial complex or group of buildings may be covered by a single contract when they are integral parts of one industrial unit, and a garage, pump house, or other out-building commonly a part of a residential establishment may be covered by the same contract as that covering the residence itself provided such garages, etc., are not used as separate residential units. In the case of pretreatment of new structures the contracts or warranties required by the Federal Housing Administration, the Veterans Administration, or other federal agency, shall be construed to be contracts and deemed sufficient to satisfy the requirements of this section."

The requirement is that **every** licensed operator shall enter into a written contract for **each** structure.

The concept of equal protection has been traditionally viewed as requiring uniform treatment of persons under like circumstances and conditions. **Reynolds v. Sims**, 377 U. S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506; **Griffin v. Illinois**, 351 U. S. 12, 76 S. Ct. 585, 100 L. Ed. 891. This standard is met by the above statute. The legislature is not required to establish a taxing schedule based upon an elaborate scheme of the percentage of profits per job.

In **Fox v. Standard Oil**, 294 U. S. 83, 99, 55 S. Ct. 332, 79 L. Ed. 777, the Court observed:

"'When the power to tax exists the extent of the burden is a matter for the discretion of the lawmakers. . . . 'Even if the tax should destroy a business it would not be made invalid or require compensation upon that ground alone.'"

The legislature has not exceeded its authority by requiring that a three dollar tax be imposed upon every operator for each contract.

3. Procedural Due Process Is Met.

Finally appellants assert that the bias of the Commissioner of the Department of Agriculture for the State of Tennessee is shown when the Department refused to consider any procedure other than the hearing procedure as set forth in T. C. A., § 43-614. Appellant seeks to support his position by another affidavit which contains information presented for the first time to this Court. Appellees submit that the Court should not be concerned with this information but without waiving this objection would invite the attention of the Court to certain facts, some of which are apparent therein. The appellee, H. L. Bruer, is Director of the Division of Plant Industries for the Department of Agriculture of the State of Tennessee and is responsible for the enforcement of Chapter 6, Title 43 of the Tennessee Code Annotated. The record reflects that the Notices of Intention to Revoke were signed both by the Commissioner of Agriculture, appellee W. F. Moss and appellee Bruer who is primarily responsible for the administration of the chapter. It is apparent from the affidavit that appellee Bruer attended the referenced meeting and the Commissioner did not attend. The irrelevance of such meeting is therefore apparent as the decision announced at that time was by the enforcement authority, i. e., appellee Bruer and the Commissioner was not presented those facts.

The thrust of appellant's contention is that when a party charged with 1398 separate violations of a statute offers restitution for the alleged illegal conduct and such offer is rejected, leaving the party to the statutory hearing processes, bias must be presumed. The imagination of no one is extended by the universal appeal of such a

proposal to flagrant law violators after charges are placed against them.

The provisions of T. C. A., §43-614, meet the standards of due process and are not questioned by appellants. Further, there is nothing unusual about the "charging" procedure adopted by the Department of Agriculture of the State of Tennessee, an administrative agency.

Appellees averred in their answer that the Department of Agriculture and the Commissioner of the said Department are not primarily in the position of prosecuting for alleged offenses and that, therefore, the initiating of proceedings and judging of the said proceedings can be combined. It was further averred by the appellees that the issuance of the notice of intention is merely the procedure followed in the initiation of the complaint and that this is the usual procedure wherein a subordinate officer decides whether or not to recommend to the department head that proceedings be initiated. Lastly, it was averred that no prejudgment of the facts can be shown. These averments must be taken as true to the extent factual questions are presented. 1 Gibson, **Suits in Chancery**, Sec. 447 (5th Ed. 1955).

"The case law, both federal and state, generally rejects the idea that the combination with judging of prosecuting or investigating functions is a denial of due process, although a few exceptions can be found." 2 Davis, **Administrative Law**, Sec. 13.02; **Marcello v. Bonds**, 349 U. S. 302, 75 S. Ct. 757, 99 L. Ed. 1107; **Shaughnessy v. United States**, 349 U. S. 280, 75 S. Ct. 746, 99 L. Ed. 1074. **F. T. C. v. Cement Institute**, 333 U. S. 683, 68 S. Ct. 793, 92 L. Ed. 1010 (1948); **Pangburn v. C. A. B.**, 311 F. 2d 349, 356 (1st Cr. 1962), and cases cited therein.

The problem presented herein is aptly summarized in the following from 2 Davis, **Administrative Law**, Sec. 13.10, at 237-238 (1958):

"In a typical prosecuting agency a subordinate officer to whom investigators report decides whether or not to recommend to the agency heads that proceedings be instituted. The agency heads study the recommendation and the supporting materials to whatever may be necessary to dispose of the problem." . . .

(1) it is a distortion to say that . . . an agency . . . is taking a position on factual issues by the issuance of a complaint, except to the extent of finding a prima facie case on the facts and determining that the allegations, if proved, are sufficient as a matter of law. This closely resembles a judge's task of deciding on demurrer—and no one would contend that a judge who overrules a demurrer should be disqualified from proceeding to try the case. The difference is that the agency heads who approve the issuance of a complaint do not merely assume that the allegations of fact are admitted for demurrer purposes, but they must to some extent appraise the factual materials to determine whether or not the investigators have produced enough to justify prosecution. Perhaps the closest analogy is the granting of a temporary restraining order by a judge who then proceeds to hear evidence on the question of a temporary or permanent injunction. The award of the restraining order commits the judge to some extent as to his view of the probably facts in advance of a full development of the evidence."

Appellees submit that the State court properly held that it cannot be presumed that the Act will be administered otherwise than in compliance with federal and state constitutional directives. The power of the Court to pass upon the constitutionality of a statute will arise only when the interest of litigants require the use of that judicial authority for their protection against actual in-

terferences, a hypothetical threat being insufficient. **United Public Workers v. Mitchell,** 330 U. S. 75, 67 S. Ct. 556, 91 L. Ed. 754. Nothing presented to this Court suggests bias upon the part of the Commissioner of Agriculture. Any circumstances tending to show bias may be presented to the proper authorities when and if a hearing is conducted on the charges.

CONCLUSION.

We respectfully submit, therefore, that the appellants present no substantial question for the decision of this Court, and that the judgment of the State court should be affirmed.

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GEORGE F. McCANLESS,
Attorney General,

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PAUL E. JENNINGS,
Assistant Attorney General,
Counsel for Appellees.

Certificate of Service.

I, Paul E. Jennings, certify that I have mailed a copy of the foregoing Motion to Affirm, by First Class Mail, to the Honorable Robert W. Healty, Esq., Putbrese and Fletcher, Tiber Island, 1257—4th Street, S. W., Washington, D. C. 20024, and Honorable Ben West, Esq., Commerce Union Bank Building, Nashville, Tennessee, this 12th day of December, 1968.

.....

Paul E. Jennings,
Assistant Attorney General.